No. 76-380

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE W. GINO AND EMILIE R. GINO, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether, in computing the percentage of personal household expenses deductible by an employee as ordinary and necessary business expenses under Section 162 of the Internal Revenue Code of 1954 (26 U.S.C.), the amount of time during which the home is put to business use must be compared against the number of hours the home is actually used, as petitioners contend, or, as the decision below held, the total number of hours to which the home is available for all uses.

The pertinent facts are as follows: Petitioners are husband and wife, and both taught in the Los Angeles,

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California, public school system during 1966 through 1968 (Pet. App. A, p. 2a). On the average, each spent 2 hours a night, 5 days a week, performing various non-classroom duties at home, such as reading professional journals and preparing and grading examinations (Pet. App. A, p. 2a; Pet. App. B, p. 16a). They used various nonsegregated areas of their home, including the kitchen and dining room tables, for performing this work; similar nonsegregated areas were also used for storing professional books and other materials (Pet. App. B, p. 16a).

During the years in issue, petitioners lived in three apartments or condominiums. In computing their business expenses under Section 162 of the Code (Pet. 2), petitioners claimed deductions for specified portions of their utilities and rent or depreciation expenses. They asserted that their business use of their three successive homes amounted to 20, 25, and 33⅓ percent, respectively, of the total space, and those percentages are not in dispute (Pet. App. B, pp. 16a–17a). However, in computing the proportion of time which should be allocated to business use, petitioners claimed that the fraction two-eighths, or 25 percent, should be used, based on the hours of business use (two) divided by the hours of actual use of their homes (eight). The Commissioner, however, reduced this fraction (and *pro tanto* the deduction) to two-twenty fourths, based on the hours of business use (two) over the total number of hours during which the homes were available for personal use (24) (Pet. App. A, pp. 2a–3a). The Commissioner's time computation formula had been

published in 1962 in Rev. Rul. 62–180, 1962–2 Cum. Bull. 52, and had been approved in *Hoggard III* v. *United States*, 67–2 U.S.T.C., par. 9741, decided October 27, 1967 (E.D. Va.), and in *Henderson* v. *Commissioner*, 27 T.C.M. 109.

The Tax Court allowed the full deduction claimed under the two-eighths time formula, relying on Treasury Regulations on Income Tax (1954 Code), Section 1.274–2(e)(4) (26 C.F.R.)[1] (Pet. App. C, pp. 24a–27a), and refused to follow Rev. Rul. 62–180 (Pet. App. B, pp. 20a–22a). The court of appeals reversed. It held that the formula of Rev. Rul. 62–180 should be sustained as a proper accommodation between the prohibition against deducting personal household expenses of Section 262 of the Code (Pet. 2–3) and the allowance of business expense deductions by Section 162 (Pet. App. A, pp. 3a–5a).

1. Section 162(a) of the Code allows a deduction for ordinary and necessary expenses incurred in the conduct of a trade or business. The expenses of an employee are deductible under this provision. *Trent* v. *Commissioner*, 291 F. 2d 669 (C.A. 2). Section 262 of the Code, however, bars the deduction of personal, living, or family expenses. The Code provisions disallowing deductions, such as Section 262, take precedence over deduction statutes such as Section 162. See Section 161; *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17; *Bodzin* v. *Commissioner*, 509 F. 2d

[1] Petitioners acknowledge (Pet. 7) that this regulation is not controlling. They contend only that it is a "useful analogy."

679, 681 (C.A. 4), certiorari denied, 423 U.S. 825. For years prior to 1976, Treasury Regulations on Income Tax, Section 1.262–1(b)(3) (26 C.F.R.) (Pet. 3), provided that household expenses were generally nondeductible personal expenses, but that if a taxpayer—

> uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

The court of appeals correctly held that Rev. Rul. 62–180, which provides that the portion of household expenses shall be computed using the average number of hours of business use per day (here two) divided by the number of hours which the home is available for all uses (24), is a reasonable application of these statutes and the regulation. The formula recognizes that household expenditures are essentially personal in character (see *Sharon* v. *Commissioner*, 66 T.C. 515, 524); that in the usual case, as here, no additional expenses are incurred by reason of the business use;[2] and that all household expenses must remain in the Section 262 nondeductible category unless a specific portion of such expenses is removed from such category by a proven connection to business use (see *Fausner* v. *Commissioner*, 413 U.S. 838). When the use of the home is primarily personal, the formula

[2] There is no evidence in the record to sustain petitioners' contention (Pet. 14–15) that their moves to larger homes were motivated or necessitated by the need for more space for business use.

of Rev. Rul. 62–180 thus properly begins by assuming that all hours of available use are for nondeductible personal purposes and uses that figure—usually 24 hours—as the denominator; the number of hours of actual business use then becomes the numerator of the fraction, which is thereafter multiplied by the fraction of space allocated to business use to determine the percentage of total household expenses deductible as business expenses.

In arguing that the proper fraction is business use (two hours) over total actual use (eight hours), petitioners erroneously assume that only the number of hours when a home is actually used—here allegedly only eight hours—is for personal purposes. But such an approach ignores the fact that the residence was available for use during the remaining 16 hours of the day. Since the expenses attributable to this 16-hour period were not incurred for business purposes, they necessarily were nondeductible personal expenditures. The proper fraction, therefore, is business use divided by total available use.

2. The court of appeals correctly relied upon *United States* v. *Correll*, 389 U.S. 299, which announced that rulings and regulations, such as Rev. Rul. 62–180, should not be overturned when they are reasonable (see Pet. App. A, pp. 4a–5a). Here, as in the case of the away-from-home expenses involved in *Correll*, the Commissioner was required to deal with a widely recurring factual situation, the details of which are

peculiarly within the subjective knowledge of each taxpayer. In Rev. Rul. 62–180, as in the ruling considered in *Correll*, the Commissioner promulgated rules, including the formula in issue here, in order to provide a uniform standard of administration. Nevertheless, the potential for lack of uniformity in this area prompted Congress, in the Tax Reform Act of 1976, to enact stricter, and less subjective, rules for office-in-home deductions. Section 601(a) of the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520, added Section 280A to the Code, which disallows home-office deductions in such cases. See H.R. Rep. No. 94–658, 94th Cong., 1st Sess. 157–160 (1976); H.R. Conf. Rep. No. 94–1515, 94th Cong., 2d Sess. 435 (1976). Thus, the time-factor formula challenged by petitioners will no longer be effective for taxable years after 1976.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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